Supreme Court, U.S.
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No 10-25

IN THE
SUPREME COURT OF THE UNITED STATES

MARY H. MACON

Petitioner

versus

OHIO DEPARTMENT OF JOB
AND FAMILY SERVICES

Respondent

On Petition For Writ of Certiorari
To The Ohio Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Why did the Ohio Administrative Law Judge presiding over the Ohio State Personnel Board of Review hearings rule against the Petitioner on 3 of the 4 violations cited in the Removal Letter when evidence and testimonies supported the Petitioner?

2. Why were records missing in appellee's EXHIBIT 2, 'Employee History on Computer for Appellant' presented by the appellee in the Ohio State Personnel Board of Review hearing?

3. Why were subsequent appeals to the Ohio Court of Common Pleas, the Tenth District Court of Appeals and the Ohio State Supreme Court a waste of time and money?

4. Did the Ohio Department of Jobs & Family Services Management Information Systems Deputy Director cause the allegedly abused employee to potentially be at risk when she did not reassign the employee immediately, confront the employee's supervisor and initiate an investigation, post haste?

5. Did the Ohio Department of Jobs & Family Services Management Information Systems Deputy Director target the Petitioner for removal and employ discriminatory practices to achieve that objective?

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2009
No._____

Mary H. Macon, Petitioner
v.
Ohio Department of Job and Family Services

PETITION FOR A WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Mary H. Macon, the Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Ohio Supreme Court entered in the above-entitled case on _____.

OPINION BELOW

The judgment of the Ohio Supreme Court was entered on _____.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257(1).

PARTIES

Mary H. Macon, Petitioner

Ohio Department of Job and Family Services, Respondent

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STATUTE INVOLVED

Ohio Revised Code 124.34 see Appendix A.

STATEMENT OF THE CASE

Procedural history,

This action arises out of the wrongful termination November 21, 2005 of Mary Hackney Macon who was an Ohio State Government employee (hereafter "Petitioner"). he Petitioner held the position of Data Systems Administrator from December 10, 2001 until November 21, 2005.

The Petitioner filed an appeal with the Ohio State Personnel Board of Review. The first hearing date was June 13, 2006. A settlement agreement was offered by the Ohio Department of Job & Family Services. When the document was sent to the Petitioner, it was reviewed and rejected. The law firm representing the Petitioner was fired and the Petitioner requested the Administrative Law Judge to reschedule the hearing.

The Ohio Department of Job & Family Services submitted a motion to the Administrative Law Judge to limit the back pay of the Petitioner if the Petitioner won the case to the amount that would have due as of June 13, 2005 if the Petitioner had signed the proposed Settlement Agreement. The Administrative Law Judge granted that motion.

The Administrative Law Judge presiding over the case ruled in favor of the appellee on three (3) of the four (4) alleged violations of Ohio Revised Code 124.34, e.g., neglect of duty, dishonesty and failure of good behavior and finding the charge of insubordination was unsupported by testimony or evidence.

Testimony supporting the Petitioner and refuting statements made by the appellee was ignored and statements by the appellee remained unchanged and quoted by the ALJ in her report. The statements can be reviewed in the hearing transcripts and are addressed in the 'Relevant Facts' portion of this document.

The subsequent decisions made by passive judiciaries, e.g., Ohio Court of Common Pleas, Ohio Tenth District Court of Appeals and the Ohio State Supreme Court could potentially result in severe implications for Ohio State Government union and exempt employees, e.g., prior to this case, employees were allowed to prepare their job performance evaluation appeals during work hours as a normal practice.

The court records are inaccurate, misleading and basically distorted statements attributed to the Petitioner. According to the 'laws' of the legal process in Ohio quoted on the decision paper from the Tenth District Court of Appeals, 'No new' evidence can be submitted once the case moves from the trial court to the next court. In other words, innocence is not as important as keeping the allegations on track and new information will not be tolerated.

The Petitioner was unaware of the 'yellow brick road' requirements and attempted to supplement the court records by providing additional information to the three Judge panel presiding over oral arguments in the Tenth District Court of Appeals. The Petitioner was told no documents would be accepted by the Judges and was advised to submit a Motion to Supplement the Record and a Notice of Supplemental Authority (Unemployment Benefits denied; however, the hearing officer's decision letter states the Petitioner was credible, not the accusers).

The Petitioner submitted the motions and requests were denied.

The disgusted Petitioner had an attorney file her appeal in the Ohio State Supreme Court. That court denied Jurisdiction was dismissed her appeal. The Petitioner submitted as much 'additional' information as possible by including facts in a Motion for Reconsideration and another Motion Requesting Fair Consideration filed in the Ohio Supreme Court. Neither changed the decision.

The Petitioner had a serious accident in March, 2005. After surgery, she returned to work as quickly as her doctor would allow, e.g., part time until June 26, 2005. The Petitioner continued taking medication for pain, medication for anti depression and sleeping medicine. Her injuries were covered by Ohio Bureau of Workers Compensation and medicine, as well as treatment, was required long after the Petitioner was fired from her job in Ohio. The Petitioner was treated by a pain management specialist (Dr. Gupta at 162 Barnwood Drive Edgewood, KY phone 859/331-4159) until *May 2009.*

There is no denial that the Petitioner's management approach was different from the methods of other Bureau Chiefs in their areas. There were no good ol' boy decisions made in her Bureau and her direct management reports, including Section Chiefs, were required to do their jobs.

A Deputy Director of Management Information Systems in the largest agency in the State of Ohio, e.g., Ohio Department of Job & Family Services, responsible for a Computer Network Services Division and a Computer Systems Development Division (multi million dollar area within the Agency) who did not know she could scan in a document and email it to one, or everyone, fired a Data Systems Administrator who knew that and had

over twenty years experience in computer technology.

Relevant facts

1. The Administrative Law Judge presiding over the Ohio State Personnel Board of Review hearings ruled against the Petitioner. Testimonies and evidence clearly vindicate the Petitioner. Transcripts, tape recordings and other notes from the 3 days of hearings support that statement.

2. The following information is missing in appellee's list of exhibits, number 2 item ' Employee History on Computer for Appellant', e.g., report 'EHOC' for Employee SM280889C (Macon, Mary H) dated January 26, 2006 presented to the Administrative Law Judge at the Ohio State Personnel Board of Review:

1. no record of the Petitioner's injuries in March 2005;
2. no subsequent approval records for dates Petitioner was unable to work;
3. no approval records for dates working ½ day;
4. no approval records for one week worked ¾ day ending June 2005;
5. The report showed hire date information, other notes and approval records for disability ben(efits) for the Petitioner from May 15, 2004 through June 26, 2004. In 2004 the Petitioner had an accident at home in Grove City, Ohio and fractured her spine.

3. The Petitioner's efforts to enter pertinent and critical information into her court case records were futile due to Judicial bias/deferral and support for the appellee, the Ohio Department of Job & Family Services.

4. The Petitioner was not questioned by her supervisor, the Deputy Director, *at any time about any accusations made against her by the subordinate employee* (the Deputy Director/Petitioner's supervisor assigned that employee to work for the Petitioner). Prior to being assigned to work for the Petitioner in July, 2005 the subordinate employee had been on medical leave because of an unusual mental condition, e.g., she introduced herself to the Petitioner the first day she reported for work in the Petitioner's Bureau and explained that she wanted to tell the Petitioner before 'someone else did' that she was a 'cutter'. *Because of the subordinate employee's possible mental instability potential, it should have been an urgent matter for the Petitioner's supervisor to quickly intervene after hearing there were any complaints of mistreatment of the subordinate employee.* She should have met with the Petitioner, detailed the allegations and it would have been imperative that the subordinate employee be reassigned immediately to another area while a full investigation of the allegations made against the Petitioner was conducted. What should have been professional management procedures for dealing with subordinate employee complaints/issues did not happen, obviously. The Petitioner was told about the subordinate employee's allegations October 4, 2005. The allegedly 'abused' employee was not reassigned before the Petitioner was fired. The same allegedly abused employee was designated as the appellee's representative of the Ohio Department of Job & Family Services at the Ohio State Board of Review hearings.

If the allegations had been true, by not taking the immediate actions required in dealing with those allegations, the Deputy Director would have caused the State of Ohio to be at great risk as well as the allegedly abused employee. The Deputy Director was fully aware there was no risk to the State nor the employee.

5. The Petitioner was subjected to discriminatory treatment.
The other Bureau Chiefs reporting to the same Deputy Director/supervisor were not ordered to attend college level technical classes. Their job descriptions were the same as the Petitioner's. Review of their personnel files, obtained through an open records request, indicated none of the other Bureau Chiefs had the technical experience and background the Petitioner possessed, e.g., the Petitioner had been an Internal Auditor/Computer Specialist for a United States Defense Contractor for seven years, a Systems Analyst Chief, Computer Systems Engineer and Computer Applications Development Branch Manager in Kentucky State Government for a total of eleven years.

In March, 2005 the Petitioner was 59 years old when she had a work related injury which required surgery and several weeks of recovery. The Petitioner worked part time until the last week of June, 2005. The Petitioner was sixty years old November 15, 2005 and fired November 21, 2005.

The Petitioner's job evaluation was due June 26, 2005 and conducted Friday July 15, 2005 by the MIS Deputy Director. The monthly report, *e.g.*, "Automated Performance Review System, Performance Review Report, Management Info Services 6/1/2005 to 6/30/2005 ," shows the Petitioner's evaluation was 'timely'.

When Human Resources was told that was an error, the response was "That was not an error, the MIS Deputy Director's supervisor did not want information on the report to 'look bad' on the Deputy Director's record."

REASONS FOR GRANTING THE WRIT

As demonstrated below, critical case information was not provided at the State Personnel Board of Review

hearing, nor to the Court of Common Pleas Judge for review. It was only after the Petitioner learned that her witnesses were not going to be heard at any point in the action that the Petitioner decided to retrieve her files and provide this information.

The Petitioner was a bureau chief for four years. As demonstrated below, critical information was not provided at the State Personnel Board of Review hearing nor to the Court of Common Pleas judge for review. It was only after Petitioner's case was filed in the Tenth District Court of Appeals that she learned her witnesses were not going to be heard at any point in the action. The Petitioner retrieved her files and endeavored to provide t his information to the court *pro se*.

Judith McNabb worked in the Petitioner's bureau for 4 months. The Petitioner had witnesses at the hearing who worked with her for two to three years and were dismissed by the ALJ, Marcia Scholl, without being allowed to testify on the Petitioner's behalf. Judge Scholl gave the Petitioner the subpoenas to have them appear at the hearings, then instructed t the Petitioner's attorney to dismiss them to go back to work before the hearing was concluded.

All of the Petitioner's case files were in her attorney's office in Columbus, Ohio until March 9, 2009, the day she picked them up.

Those files included the following note that the Petitioner wrote on July 26, 2005:

July 26, 2005 first day Becki Singleton told me she helped McNabb get supplies and 'settle in' in the cubicle directly across from Becki's cubicle. McNabb told Becki she was a 'cutter' and that was why she was on disability leave. McNabb also added she had heard that 'they' were trying to get rid of Mary Macon and she was worried that she would not have a job when "they" did.

Liston assigned McNabb to work for the Petitioner before McNabb returned from the disability leave.

July 26, 2005, Judith McNabb also came into the

Petitioner's office and introduced herself to the Petitioner. She stated she had been on medical leave for a obsessive compulsive disorder and was a "cutter", *e.g.*, self mutilation. The Petitioner found it disturbing to hear McNabb say that she made cuts to her own body. McNabb showed the Petitioner her arm, and asked the Petitioner whether she wanted to see more. The Petitioner replied "No, thank you".

McNabb came to the Petitioner's office many times. There were days when McNabb appeared to have tears in her eyes, seemed distraught and began complaining about her family. After listening to her for a few minutes, the Petitioner would try to redirect McNabb's dialogue to work related subjects.

Early one morning, McNabb came into the Petitioner's office and announced that she had to leave work to try to borrow bail money to get her husband out of jail.

McNabb alleges that the Petitioner made statements during staff meetings requesting the managers not to give her work. The Petitioner does not recall ever making any comments in staff meetings asking the managers not to give McNabb work. Assisting the Petitioner and helping Petitioner's section chiefs was McNabb's job. Approximately 40% of the Petitioner's work day was spent in meetings.

Also in the Petitioner's files was a copy of the all the pages/documents submitted September 26, 2005 to the Department of Administrative Services for her third level performance evaluation appeal. The Petitioner's third level performance evaluation appeal packet had only sixty-three pages including the index.

This evidence negates McNabb's and Leckliter's outrageous claims of the 'voluminous' number of copies made and renders McNabb's claim that "*she* worked on [the Petitioner's] appeals" for a vast number of hours from the time she came to work for the Petitioner until October 4th, 2005 totally

unreasonable and ridiculous. No reasonable person would conclude that anyone else could contribute anything of value to the Petitioner's appeals nor could anyone spend "hours and hours" copying sixty-three pages.

After the third performance evaluation appeal had been submitted to DAS September 26, 2005 – there was nothing left to do on the Petitioner's appeal. This invalidates McNabb's allegation that she worked on the Petitioner's appeal until October 4, 2005.

2005 Dates and events: Performance Evaluation, Appeals, Notes

July 15th - Kim Liston gave the Petitioner an unsatisfactory rating on her annual performance evaluation.

July 20th -The Petitioner filed a level one performance evaluation appeal.

McNabb reported to work July 26th,2005.

August 16th - first[t] appeal denial was received. McNabb was on leave without pay August 17th.

August 18th - The Petitioner filed a level two performance evaluation appeal. McNabb on leave without pay August 19th.

September 12th - second appeal denial was received McNabb on leave without pay September 15th,

September 21st partially out on sick leave

The Petitioner called McNabb Sunday September 18th and invited McNabb to her house. Earlier in the week McNabb came to the Petitioner's office and told the Petitioner that her husband was having friends over to their house that weekend and *she and her son would have to be out of the house while they were*

there. She said she and her son would just be "driving around" all day. The Petitioner offered cake and she and her son were welcome to stop by. The Petitioner told McNabb that she was working on her appeal. The Petitioner usually returned to her home in Bedford, Kentucky on Fridays after work to help take care of her Mother but the Petitioner was working on her files at her home in Grove City, Ohio that weekend.

September 23rd Macon out on vacation

September 26th - The Petitioner filed her third and final appeal She left the air center a little after noon for a mandatory training session for all contract managers, since Liston had assigned her the additional duty of being the Deloitte contract manager. The training lasted until at least 4:30 p.m., and the Petitioner did not have time to go back to the office. The Petitioner called McNabb and asked her to check with the Deputy's office to see if there were evaluations to drop off at the State Office Tower and that the Petitioner needed McNabb to bring the Petitioner her appeal documents. The Petitioner told McNabb that she would meet her in the parking garage because the Petitioner needed to deliver that documentation to DAS. When McNabb arrived in the parking garage, she gave the Petitioner the documentation and the Petitioner gave McNabb two dollars for parking. The Petitioner did not ask McNabb if she had picked up evaluations from Liston's office and the Petitioner did not see McNabb leave the garage, e.g., assumed she was going into the SOT. The Petitioner gave McNabb the two dollars because McNabb had mentioned in one of her visits to the Petitioner's office that she did not have much money.

November 21st - Third appeal denial was delivered to the Petitioner's office by the reviewer, William Kaczmarek. It was dated October 28, 2005 and the Petitioner was wrongfully terminated that day.

Upon remand, the Petitioner will offer as supporting documentation, a chronology of events with badge reader information showing the hours McNabb was at the Air Center where the Petitioner and McNabb worked during the time the Petitioner submitted her appeals.

2005 Dates and events: Discipline

September 15th – the Petitioner was called to Liston's office for an investigatory interview – performance evaluation goals

September 22nd – the Petitioner was told to attend meeting with Liston and Phros at the State Office for a verbal reprimand

The Petitioner's response to the accusation that she lied to Liston and Phros about coming to the meeting with McNabb follows:

"When I asked McNabb if there was anything she could do downtown while I was at the tower, she said she could pick up some 'things'. I did ask her to drop me off. I **did not** tell McNabb that I was tired, as she claimed. I had just left a meeting with one of our sections in the bureau which ran later than expected. I *did not* tell her that I told Liston and Phros she was downtown on business."

Phros wrote his version of what the Petitioner said about going downtown with McNabb in an email to Connolly (HR) but *Liston's statements in an email to Connolly agreed with the Petitioner's explanation.* The Petitioner pointed that out to Leckliter while she was on the stand. He "thanked" her.

Regardless of the evidence presented at that SPBR hearing (using the appellee's own evidence documents), Leckliter continued his accusations that the Petitioner lied. He made that accusation repeatedly in spite of the fact the email from Liston to Connolly supported what the Petitioner said, *not*

what Phros said in his email to Connolly.

October 4th – summoned back to the air center from a meeting with bureau customer for an interrogation by Larry Phros that lasted approximately three hours and, when it was over, Phos gave the Petitioner a reprimand letter from Liston to sign. It stated that "it had come to their attention that I had been using state time, state resources and other state staff for personal work on a performance evaluation appeal and the letter said that I was on notice not to work on performance evaluation appeals on state time and my actions in this matter may result in discipline up to and including removal".

October 4th - At no point prior to October 4th, 2005 did Liston or McNabb say *anything* to the Petitioner about problems McNabb reported in her complaint/document to Human Resources dated September 29, 2005 with an exaggerated and inaccurate section dated October 4th.

November 7th - Called by Human Resources and told to pick up a predisciplinary meeting notice

November 16th - Predisciplinary meeting with Connolly and Phros The Petitioner describes the meeting as "bizarre; *e.g,* when the Petitioner asked Connolly for a copy of the questions, Connolly said the Petitioner could have those after the meeting but that she did not have to ask the questions on the sheets. Of course that meant the answers that the Petitioner wrote down in her notes would not necessarily be for her questions. The Petitioner began to write the questions as well as her responses and Connolly said, "OK, I'll just ask the questions on the sheets". The Petitioner agreed, but now realizes that she should have kept writing everything.

Connolly wrote her 'version' of the predisciplinary

meeting and sent it to the agency director, Riley; that version, however, did not accurately reflect what had occurred at the meeting. Connolly begins her story/report by saying that the Petitioner attempted to use a tape recorder in the meeting. Such is not the case The Petitioner showed Connolly the tape recorder and asked Connolly if she could record the meeting since she had no one attending with her. Connolly said, 'No, that will not be allowed'.

As the Petitioner leaned over to put her tape recorder in her purse, Connolly said, 'And that means you have to turn it off, too'. The Petitioner brought it back up to the table, showed Connolly that the tape recorder was already off and told her 'I do not do things like that.'

At the end of the meeting, someone was yelling to Phros on his cell phone that he had in his pocket. He said 'I don't know how that happened'. The Petitioner said 'I do'. Phros had obviously called someone and left the connection open in order for them to hear everything said in the "private" meeting.

Connolly intentionally omitted Phros broadcasting of the meeting in her report to Riley. The Petitioner was not permitted to record the meeting but Connolly said nothing to Phros about the cell phone. Evidence of other irregularities in the hearing, will be presented upon remand..

November 18th - Connolly sent her inaccurate report on the predisciplinary meeting to Barbara Riley, ODJFS Director.

November 21st – The Petitioner was wrongfully terminated. She was given a removal letter from Riley and a guard escorted her out of the air center.

The statements in the Respondent's brief below are taken out of context, and are designed to create an image of a supervisor, namely the Petitioner, out of control and not performing her duties. At the SPBR hearing, the Petitioner provided customer surveys

which proved that her bureau and she individually were doing good work. Those statements were ignored. Although the ODJFS business manager stated that the Petitioner's work was good, she was given an evaluation citing poor performance.

At the SPBR hearing of November 2, 2006, Leckliter **stated:**

"Beginning in late july 2005, Macon discussed her appeal with McNabb on a daily basis through october 4th, 2005, when the agency issued Macon an abatement letter regarding her not utilizing either her own or McNabb's state time in pursuit of her appeal and warning her not to retaliate against Ms. McNabb."

Such is clearly not the case. There could be no reason to issue "an abatement letter" dated October 4, 2005 regarding work on a third level performance evaluation appeal that had already been submitted to DAS September 26, 2005.

Leckliter continued:

"Unfortunately, Macon ignored this directive and just a few days later confronted McNabb with the suggestion that maybe McNabb should go back out on DISABILITY and threatened her with a transfer to the SCOTI. program. "

Contrary to Leckliter's version of McNabb's statements, the Petitioner did not go see McNabb "just a few days later". McNabb correctly stated that the Petitioner went to see her after the meeting, *e.g.*, Phros' interrogation. McNabb told the Petitioner several times about her significant mental disability, and the Petitioner was very concerned about McNabb. The Petitioner did not confront McNabb nor threaten to transfer her to the SCOTI section, as Leckliter alleges.

As flawed as it was, the Petitioner saw no statement in McNabb's writeup' for Human Resources that the Petitioner "*confronted*' her nor '*threatened* to transfer

her to the SCOTI section' That was a deliberate attempt by Leckliter to vilify Macon as aggressive, belligerent, deceitful, retaliatory etc.

Very little of McNabb's report on the "problems" is accurate .

It is true that the Petitioner asked McNabb to find and print the policy on the intranet, but the Petitioner testified that there was very little conversation.

It is also true that the Petitioner went to see McNabb after the meeting, *e.g.* Phros' interrogation

It is also true, as McNabb said, that "After the meeting Mary came upstairs and told me she was sorry." The Petitioner readily concedes that she did so.

McNabb then continues:

"She stated she didn't realize that I was under so much stress." Such is certainly the case, but at that point, McNabb started crying, said that she was so sorry for saying "those things", that she would not answer any more of "their" questions, and that the Petitioner could trust her. McNabb said that "they" would have to "put me on the stand before I'll answer any more of their questions." While making these statements, McNabb continued crying uncontrollably. Instead of confronting her, the Petitioner consoled McNabb and told her not to worry, *e.g.*, that everything would be ok.

Prior to October 4th, McNabb had come to the Petitioner's office, many times, had talked about her family problems, and had appeared to have tears in her eyes; however, on this occasion, she was considerably more agitated. It was the Petitioner's responsibility to consider McNabb's welfare and try to assist her.

Sensing that this was a crisis and a potentially disastrous situation the Petitioner immediately called William Kaczmarek, the attorney in DAS to

whom she had sent the level three evaluation appeal, and explained the difficult situation. Mr. Kaczmarek advised the Petitioner to tell McNabb that she could go back out on medical leave and that she would not have a waiting period to get her next paycheck. The Petitioner did so, since the was concerned that McNabb might again attempt to injure hurt herself.

In order to support her statements describing that event, *i.e.*, before the first SPBR hearing, the Petitioner requested and received a subpoena for William Kaczmarek. However, when the Petitioner attempted to serve the subpoena before the June hearing date, she was told by DAS staff that Kaczmarek no longer worked in DAS, and they did not know how to locate him.

The Petitioner eventually discovered Mr. Kaczmarek's new work address and phone number, more than three years later, and the Petitioner called him. Kaczmarek said he did not remember specifically what was said in the October 4th, 2005 phone call, which is reasonable, given the interim involved.

Kaczmarek is now an Assistant Prosecuting Attorney in the Cuyahoga County Prosecutor's Office, phone number 216/443-7800.

The only conversation the Petitioner had with McNabb concerning any employee's mental issues involved the Petitioner's secretary, who was going to be assigned to work for McNabb at some point.

The matter of the Petitioner's having asked for a copy of McNabb's position description is readily explained. Whenever there is a change in responsibilities, *e.g.*, Petitioner's secretary who had reported to the Petitioner now would be reporting to McNabb, a change to the employee's position description is necessary.

The Court should also note that even while the Petitioner was being disciplined on a routine basis, Liston assigned her to replace Doug Bright as the

Deloitte contract manager. Doug worked for Joe Duda.

The 1st SPBR hearing was June 13, 2006 and the hearing officer was ALJ Marcie Scholl.

At that time, it appeared there could be a settlement agreement reached. While the attorneys were discussing various terms the agreement should have, the Petitioner was in the hearing room talking to Judge Scholl.

During that conversation, Judge Scholl told the Petitioner that she has a daughter who had a learning disability. At that time, she was unaware that many of the allegations and accusations made in the Petitioner's case were made by a subordinate who had a serious psychological disability.

The following colloquy occurred at the hearing of September 26, 2006:

Mr. Lillard: And perhaps you said that. Did we address the issue of estoppel and bar or merger and bar?Ms. Scholl: We haven't yet because I don't actually at this point even know why it is that she's being removed. So for me to determine that that document that you've brought up is merger and bar, I can't do that because I don't have the facts at hand to do that, so we will proceed. Your motion can be kept in abeyance. I'll rule on it either at the end of the hearing or in my report and recommendation.

Page 23 of the SPBR transcript dated September 26, 2006:

Included in the proposed settlement from ODJFS was a stipulation that the Petitioner would never apply/work at ODJFS, again. The agreement was rejected, for that reason. The Petitioner felt that this condition was an insult to her personal and professional integrity.

The following colloquy took place at the SPBR hearing of November 2, 2006:

Ms. Bird: Your honor, Mr. Morrobeto is no longer employed by the agency. ms. singleton is an administrative assistant to ms. macon or within the same bureau, I believe. and both witnesses have been identified as character witnesses.

Page 116, section 3 of the SPBR hearing November 2, 2006

The following colloquy was had at the same hearing:

mr. Lillard: mr. morrobeto was ms. macon's acting section chief during the time period at issue and—

Interrupted by

Ms. Bird: mr. morrobeto was removed from—left employment of ODJFS before Ms. macon's performance evaluation.

Id., at 117, section 1

Ms. Bird was clearly mistaken, Mr. Morabito had never been 'removed from' his job in any bureau. Ms Bird's testimony implies that Mr. Morabito was no longer working, *e.g.*, 'left employment' at ODJFS.

In fact, Mr. Morabito had accepted a section chief position in the Ohio Department of Taxation in March 2005 and he is there currently, *i.e.*, approximately 4 years later. He has a Bachelor Degree of Science and is clearly a well-qualified and valuable employee.

Mrs. Singleton was never assigned to the Petitioner's bureau. She was a dedicated, hard working, efficient State employee who worked near the Petitioner's office and directly across from Judith McNabb. Singleton has since retired; but both Ms. Singleton and and Mr. Morabito are persons of great integrity who exemplify the qualities of civil servants.

The colloquy continues

Judge Scholl: "okay. well, i don't see any other purpose that they would have except for that of

disparate treatment and they don't meet the guidelines under our disparate treatment rule of being similarly situated in that i did not hear that either one of them were a bureau chief, so—

and if they are character witnesses our rules specifically state that we don't allow character testimony, so I don't see where their testimony would be relevant, so if you want to proffer their testimony you can do so."

Id.

Judge Scholl ruled that ODJFS had failed to prove the insubordination charge but ruled for ODJFS on charges of neglect of duty - which the Petitioner contends is disproven by the Record - dishonesty - which the Petitioner also disputes - and failure of good behavior. As to the latter charge, the Petitioner submits that she is a professional and never has there been any question concerning her behavior or demeanor

When Judge Scholl instructed Mr. Lillard to dismiss the Petitioner's witnesses, the result was that the court only heard the testimony of the Respondent's witnesses. Such a hearing clearly contravenes the requirements of Due Process.

ODJFS evidently contends that the Petitioner was incompetent, manipulative and lazy, who only received good evaluations while working for Mr. Wolfe because he was responsible for hiring the Petitioner..

Such is simply not the case.

In Kentucky, the Petitioner was a Computer Systems Engineer working for Scott Hampton and her last performance evaluation was all "exceeds."

In Kentucky, the Petitioner was a Computer Systems Analyst Chief working for Judy Kail and her last performance evaluation was all "exceeds."

In Kentucky, the Petitioner was an Applications

Development Branch Manager working for David Wolfe and her last evaluation was all "exceeds." This was a newly established branch and the Petitioner was the first branch manager. The Petitioner and her associates worked on new development projects and were recognized by the Kentucky State Legislature for the work done on one of those projects, *e.g.*, a child adoption module. Specifically, the Petitioner wrote the program specifications for coding the routine matching the prospective adoptive parents to potential adoptees.

When the Petitioner retired from Kentucky State Government, she had tenure and a relatively substantial salary. She accepted the job of bureau chief managing a *new* bureau in Ohio with a probationary period and a waiting period to become a classified employee in Ohio.

The Petitioner's starting salary at ODJFS was approximately $72,000, *e.g.*, step one in pay grade 18.

When her probationary evaluation was due (ODJFS), the Petitioner was instructed by her supervisor, David Wolfe, to write a self evaluation. The Petitioner asked the individuals who reported to her to do an assessment of her work as a bureau chief at ODJFS. These documents were submitted as evidence but were held to be irrelevant.

From the Brief of Appellee - Statement of the Case, page 7:

In its brief to the court below, the Respondent stated:

"Macon commenced employment as a Data Systems Administrator with ODJFS on December 10, 2001. Macon had a working title of Bureau Chief and was being paid at the rate of $41.50 per hour, of $86,320.00 annually, at the time of her removal on November 21, 2005."

The Court should note that there is no higher classified exempt position within ODJFS, and

$86,000.00 is not an unusual salary for the type of work the Petitioner performed.

As a bureau chief, the Petitioner worked long hours and was available 24/7. She went to *many off site meetings* and paid for parking herself and never sought reimbursement. The only time she submitted a travel expense for reimbursement was when she (and a business/ODJFS employee) traveled to Cleveland for a meeting.

Case background information:

The Petitioner had an accident in April 2005, had surgery and was working part time during the latter part of her recovery time. Her previous supervisor, David Wolfe, was discharged in June prior to her return to full time work. Subsequently Liston became her supervisor. The Petitioner returned to work full time on June 26th 2005, only three weeks prior to the performance evaluation meeting July 15th with Liston. The rating on her evaluation was 'unsatisfactory'. Liston's account was found to be more credible simply because it was standard practice in Human Resources to always support the highest level of management involved, as an examination of the Bureau's files will show.

Because Liston rated her job performance unsatisfactory, the Petitioner asked her for supporting documentation. Liston delivered her documentation to the Petitioner's office at 11:30 a.m. on July 25th . Upon tendering the documents to the Petitioner, Liston said that she had been told told both Wolfe and the Petitioner were "in the Kentucky Mafia." Liston then proceeded to tell the Petitioner about her own assignment on her last job. Liston stated that she had been sent by her previous company to close down one of their offices. She said that included employees who were disabled. She added that one man had no arms, just 'flippers' because his mother took some kind of medication

before he was born. She said when she gave him the papers, he began to shake. Continuing her story, Liston said she got back on the plane, had a glass of wine and tears came down her face.

After Liston had left the Petitioner's office, the Petitioner wrote a narrative using the statements that Liston had made about Wolfe and the Petitioner being in the Kentucky Mafia and took the report to ODJFS Human Resources the next morning. Human Resources sent the Petitioner to Joe Silver (EEO). Silver escorted the Petitioner to the Chief Inspector's office, and she gave them her report. The only response the Petitioner received from them was an email advising her that they had investigated and had found that no one was afraid of her.

CONCLUSION

For all the foregoing reasons, Petitioner Mary Macon respectfully requests that this Court reverse the decision of the Common Pleas Court and restore Ms. Macon to her previous position with Appellee ODJFS with full back pay and all other benefits to which she is entitled.

Respectfully submitted,

Frank Yates, Jr.
4602 Southern Parkway
Louisville, KY 40214
502-361-8422
Counsel for Petitioner

APPENDIX

Ohio Revised Code 124.34 Reduction in pay or position - suspension - removal.

(A) The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts of the state, holding a position under this chapter, shall be during good behavior and efficient service. No officer or employee shall be reduced in pay or position, fined, suspended, or removed, or have the officer's or employee's longevity reduced or eliminated, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of any policy or work rule of the officer's or employee's appointing authority, violation of this chapter or the rules of the director of administrative services or the commission, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony. The denial of a one-time pay supplement or a bonus to an officer or employee is not a reduction in pay for purposes of this section.

This section does not apply to any modifications or reductions in pay authorized by division (Q) of section 124.181 or section 124.392 or 124.393 of the Revised Code.

An appointing authority may require an employee who is suspended to report to work to serve the suspension. An employee serving a suspension in this manner shall continue to be compensated at the employee's regular rate of pay for hours worked. The disciplinary action shall be recorded in the employee's personnel file in the same manner as other disciplinary actions and has the same effect as a suspension without pay for the purpose of recording disciplinary actions.

A finding by the appropriate ethics commission, based upon a preponderance of the evidence, that the facts alleged in a complaint under section 102.06 of the Revised Code constitute a violation of Chapter 102., section 2921.42, or section 2921.43 of the Revised Code may constitute grounds for dismissal. Failure to file a statement or falsely filing a statement required by section 102.02 of the Revised Code may also constitute grounds for dismissal. The tenure of an employee in the career professional service of the department of transportation is subject to section 5501.20 of the Revised Code.

Conviction of a felony is a separate basis for reducing in pay or position, suspending, or removing an officer or employee, even if the officer or employee has already been reduced in pay or position, suspended, or removed for the same conduct that is the basis of the felony. An officer or employee may not appeal to the state personnel board of review or the commission any disciplinary action taken by an appointing authority as a result of the officer's or employee's conviction of a felony. If an officer or employee removed under this section is reinstated as a result of an appeal of the removal, any conviction of a felony that occurs during the pendency of the appeal is a basis for further disciplinary action under this section upon the officer's or employee's reinstatement.

A person convicted of a felony immediately forfeits the person's status as a classified employee in any public employment on and after the date of the conviction for the felony. If an officer or employee is removed under this section as a result of being convicted of a felony or is subsequently convicted of a felony that involves the same conduct that was the basis for the removal, the officer or employee is barred from receiving any compensation after the removal notwithstanding any modification or disaffirmance of the removal, unless the conviction

for the felony is subsequently reversed or annulled. Any person removed for conviction of a felony is entitled to a cash payment for any accrued but unused sick, personal, and vacation leave as authorized by law. If subsequently reemployed in the public sector, the person shall qualify for and accrue these forms of leave in the manner specified by law for a newly appointed employee and shall not be credited with prior public service for the purpose of receiving these forms of leave.

As used in this division, "felony" means any of the following:

(1) A felony that is an offense of violence as defined in section 2901.01 of the Revised Code;

(2) A felony that is a felony drug abuse offense as defined in section 2925.01 of the Revised Code;

(3) A felony under the laws of this or any other state or the United States that is a crime of moral turpitude;

(4) A felony involving dishonesty, fraud, or theft;

(5) A felony that is a violation of section 2921.05, 2921.32, or 2921.42 of the Revised Code.

(B) In case of a reduction, a suspension of more than forty work hours in the case of an employee exempt from the payment of overtime compensation, a suspension of more than twenty-four work hours in the case of an employee required to be paid overtime compensation, a fine of more than forty hours' pay in the case of an employee exempt from the payment of overtime compensation, a fine of more than twenty-four hours' pay in the case of an employee required to be paid overtime compensation, or removal, except for the reduction or removal of a probationary employee, the appointing authority shall serve the employee with a copy of the order of reduction, fine,

suspension, or removal, which order shall state the reasons for the action.

Within ten days following the date on which the order is served or, in the case of an employee in the career professional service of the department of transportation, within ten days following the filing of a removal order, the employee, except as otherwise provided in this section, may file an appeal of the order in writing with the state personnel board of review or the commission. For purposes of this section, the date on which an order is served is the date of hand delivery of the order or the date of delivery of the order by certified United States mail, whichever occurs first. If an appeal is filed, the board or commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, the appeal within thirty days from and after its filing with the board or commission. The board, commission, or trial board may affirm, disaffirm, or modify the judgment of the appointing authority.

However, in an appeal of a removal order based upon a violation of a last chance agreement, the board, commission, or trial board may only determine if the employee violated the agreement and thus affirm or disaffirm the judgment of the appointing authority.

In cases of removal or reduction in pay for disciplinary reasons, either the appointing authority or the officer or employee may appeal from the decision of the state personnel board of review or the commission, and any such appeal shall be to the court of common pleas of the county in which the appointing authority is located, or to the court of common pleas of Franklin county, as provided by section 119.12 of the Revised Code.

(C) In the case of the suspension for any period of time, or a fine, demotion, or removal, of a chief of police, a chief of a fire department, or any member of the police or fire department of a city or civil service

township, who is in the classified civil service, the appointing authority shall furnish the chief or member with a copy of the order of suspension, fine, demotion, or removal, which order shall state the reasons for the action. The order shall be filed with the municipal or civil service township civil service commission. Within ten days following the filing of the order, the chief or member may file an appeal, in writing, with the commission. If an appeal is filed, the commission shall forthwith notify the appointing authority and shall hear, or appoint a trial board to hear, the appeal within thirty days from and after its filing with the commission, and it may affirm, disaffirm, or modify the judgment of the appointing authority. An appeal on questions of law and fact may be had from the decision of the commission to the court of common pleas in the county in which the city or civil service township is situated. The appeal shall be taken within thirty days from the finding of the commission.

(D) A violation of division (A)(7) of section 2907.03 of the Revised Code is grounds for termination of employment of a nonteaching employee under this section.

(E) As used in this section, "last chance agreement" means an agreement signed by both an appointing authority and an officer or employee of the appointing authority that describes the type of behavior or circumstances that, if it occurs, will automatically lead to removal of the officer or employee without the right of appeal to the state personnel board of review or the appropriate commission.

THE SUPREME COURT OF OHIO

Mary H. Macon — Case No. 2009-1487

v. — ENTRY

Ohio Department of Job
and Family Services

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Franklin County Court of Appeals; No. 08AP1036)

Thomas J. Moyer
Chief Justice

THE SUPREME COURT OF OHIO

Mary H. Macon — Case No. 2009-1487

v. — ENTRY

Ohio Department of Job
and Family Services

It is ordered by the Court that the motion for reconsideration in this case is denied.

(Franklin County Court of Appeals; No. 08AP1036)

Thomas J. Moyer
Chief Justice

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Mary H. Macon

Appellant-Appellant

v. **No. 08AP-1036**
(C.P.C. No. 07CVF-10-14526)

Ohio Department of Job and Family Services

Appellee-Appellee

DECISION

Rendered on June 30, 2009

***Mary H. Macon*, pro se**
***Richard Cordrey*, Attorney General,**
***Timothy A. Lechlider*, and**
***Pooje Alag Bird*, for appellee**

Appeal from the Franklin County Court of Common Pleas

McGRATH, J.

[¶ 1] Appellant, Mary H. Macon, appeals from the judgment of the Franklin County Court of Common Pleas affirming the order of the State Personnel Board of Review("SPBR"), which affirmed appellant's removal from her position with appellee, Ohio Department of Jobs and Family Services ("ODJFS"). For the following reasons, we affirm.

[¶2] Appellant commenced employment with ODJFS on December 10, 2001. At the time of her

removal on November 21, 2005, appellant was in a classified civil service position as bureau chief and at the highest classified exempt position with ODJFS. On July 15, 2005, Deputy Director Kimberly Liston ("Liston") presented appellant with her annual performance evaluation. Pursuant to appellee's policy, employees are afforded three steps to appeal an evaluation. Displeased with her evaluation, appellant requested a step 1 review of her evaluation on July 20, 2005, and sais request was denied on August 16, 2005. Appellant then requested a step 2 review of the evaluation that again was denied. Appellant filed a step 3 request for evaluation by the Department of Administrative Services ("DAS"), and was notified by letter dated October 28, 2005 that DAS denied the same.

[¶3] On July 26, 2005, Judith McNabb returned from disability leave and was assigned as appellant's administrative assistant. According to McNabb, appellant discussed her performance evaluation appeal ("hereafter "appeal"), and used McNabb's time to aid in pursuit of her appeal. McNabb described that appellant had her proofread memoranda, organize materials, and conduct voluminous copying of documents, all in support of appellant's appeal. McNabb testified that, on one occasion, appellant called her at home on a weekend and asked McNabb to organize documents for the appeal. Also, on September 22, 2005, appellant asked McNabb to drive her downtown for a meeting with appellant's supervisors and had McNabb wait until appellant called McNabb to pick her up after the meeting.

[¶4] Concerned about the amount of time being devoted to appellant's appeal and about the tasks to which she was being assigned, McNabb contacted Liston, who suggested McNabb meet with Liston's administrative assistant, Susan Beamer. On September 29, 2005, McNabb met with Ms. Beamer, Assistant Deputy Director Keith Nichols ("Nichols"), and Labor Relations Officer Deborah Connoly. As a result of this meeting, McNabb submitted a written

statement with respect to her concerns, and ODJFS commenced an investigation.

[¶5] Subsequent to the investigation, Liston requested that ODJFS Labor Relations proceed with a pre-disciplinary meeting. Said meeting was held, and appellant was removed effective November 21, 2005, for neglect of duty, dishonesty, failure of good behavior, and insubordination.

[¶6] Appellant appealed her removal to SPBR. After a hearing, an Administrative Law Judge (ALJ), issued a report and recommendation finding that appellee did not prove insubordination but did prove the allegations of neglect of duty, dishonesty, and failure of good behavior. In so finding, the ALJ recognized that the matter came down to the testimony of appellant and McNabb and that appellant was not credible. In her decision, the ALJ stated the following:

> ***Appellant Macon used the power of her position to assign Ms. McNabb, a subordinate, to spend the majority of her time working on an issue personal to Appellant Macon and not in furtherance of the business of the bureau. Appellant Macon was dishonest in her motives, intimidated her subordinate, neglected her duties and exhibited a failure of good behavior by trying to absolve herself of any wrong doing by trying to case Ms. McNabb in a bad light.

(ALJ Report and Recommendation at 18-19.)

[¶7] The SPBR reviewed the matter along with appellant's objections to the ALJ's report and recommendation. After such review, the SBPR adopted the ALJ's recommendation that the appellant's removal be affirmed. Appellant appealed to the common pleas court pursuant to R.C. 119.12. On December 27, 2008, the trial court affirmed the SBPR's decision and found the ALJ's report and

recommendation was not unlawful or unreasonable, nor against the manifest weight of the evidence. The trial court also concluded the SBPR's decision was supported by reliable, probative, and substantial evidence and was in accordance with law.

[¶8] This appeal followed, and the appellant brings the following six assignments of error for our review:

> 1. THE LOWER COURT ERRED IN CONCLUDING THAT MS. MACON'S TERMINATION WAS LAWFUL AS THE UNCONTROVERTED EVIDENCE AT HEARING ESTABLISHED THAT THERE IS NO STATE LAW, ADMINISTRATIVE RULE, POLICY, DIRECTIVE, WORK RULE OR OTHER PRACTICE THAT PROHIBITS A STATE EMPLOYEE FROM ENGAGING IN THE PERFORMANCE EVALUATION REVIEW PROCESS DURING STATE TIME AND, THEREFORE, A PERSON MAY NOT BE PUNISHED FOR VIOLATING A NON-EXISTENT LAW, RULE OR POLICY.
>
> 2. THE LOWER COURT ERRED IN CONCLUDING THAT THE OUTCOME OF A PERFORMANCE EVALUATION REVIEW SOLELY BENEFITS THE INTEREST OF AN EMPLOYEE AS THE HISTORY OF THE CIVIL SERVICE SYSTEM IN OHIO CLEARLY ESTABLISHES THAT A PROPERLY FUNCTIONING AND RELIABLE MERIT SYSTEM BENEFITS ALL THE PEOPLE OF THE STATE.
>
> 3. THE LOWER COURT ERRED IN FINDING THAT MS. MACON

ABUSED HER AUTHORITY AND SPENT EXCESSIVE STATE TIME AND RESOURCES ON THE PERFORMANCE EVALUATION REVIEW AS THE EVIDENCE ELICITED AT THE HEARING ESTABLISHED THAT MS MACON AND HER SUBORDINATE SPENT NEGLIGIBLE WORK TIME ON THE PERFORMANCE EVALUATION APPEAL AND NEITHER WAS EVER ACCUSED OF FAILING TO PERFORM THEIR JOB DUTIES.

4 THE LOWER COURT ERRED IN CONCLUDING TIIAT THE ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDATION COMPORTED WITH THE LAW AS THE FACTS CLEARLY ESTABLISHED THAT PROGRESSIVE DISCIPLINE WAS WARRANTED FOR A FIRST TIME VIOLATION OF A NON-EXISTENT AND NON-ARTICULATED LAW, RULE OR POLICY _ THAT IN NO WAY AFFECTED MS. MACON IN PERFORMING HER JOB DUTIES.

5. THE LOWER COURT ERRED IN FAILING TO FIND THAT MS. MACON WAS IMPROPERLY DISCIPLINED TWICE FOR THE SAME OFFENSE WHEN THE FACTS SHOW THAT SHE RECEIVED A LETTER OF REPRIMAND ON OCTOBER 4, 2005 THAT WAS PLACED IN HER PERSONNEL FILE AND WAS THEN SUBSEQUENTLY TERMINATED BASED ON THE SAME FACTUAL ALLEGATIONS CONTAINED IN THE WRITTEN REPRIMAND.

6. THE LOWER COURT ERRED IN CONCLUDING THAT MS. MACON WAS AFFORDED ADEQUATE DUE PROCESS UNDER THE LAW AS THE ORDER OF REMOVAL CONTAINED NOTHING MORE THAN A RECITATION OF R.C. § 124.34(A) AND DID NOT PROPERLY PLACE MS. MACON ON NOTICE OF THE SPECIFIC REASONS FOR HER TERMINATION AS REQUIRED BY LAW.

[¶9] Prior to addressing these assigned errors, we must first address appellant's motion to supplement the record filed after oral arguments were heard in this matter. Ths information with which appellant seeks to supplement the record consists of Bureau of Customer Services Customer Surveys that, according to appellant, are "critically relevant." (Apr. 24, 2009 Motion at 1.) Aside from this conclusory statement, however, appellant provides no basis why this court should grant her motion of why this issue was not timely raised. Further, to the extent this motion can be construed as a suggestion that the ALJ wrongfully denied admission of this evidence, we note that this issue has not been previously been raised and, as such, is waived. See, *Leslie v. Ohio Dept. of Dev.*, 171 Ohio App.3d 55, 2007-Ohio-1170. Accordingly, appellant's motion to supplement the record is denied.

[¶10] We now address appellant's assigned errors. In an administrative appeal, pursuant to R.C. 119.12, the common pleas court considers the entire record and determines whether the agency's order is supported by reliable, probative and substantial evidence and is in accordance with law. *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108, 110-11. The Supreme Court of Ohio has defined reliable, probative, and substantial evidence as follows:

> ***"Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

(Footnotes omitted.) *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570-71.

[¶11] The common pleas court's "review of the administrative record is neither a trial *de novo* nor an appeal on questions of law only, but a hybrid review in which the court 'must appraise all the evidence as to the credibility of the witnesses, the probative character of the evidence, and the weight thereof.' " *Lies v. Ohio Veterinary Med. Bd.* (1981), 2 Ohio App.3d 204, 207, quoting *Andrews v. Bd. Of Liquor Control* (1955), 164 Ohio St. 265, 270. Though the findings of the agency are not conclusive, the common pleas court must give due deference to the administrative agency's resolution of evidentiary conflicts. *Maurer v. Franklin Cty. Treasurer*, 10th Dist No. 07-AP-1027, 2008-Ohio-3468, ¶ 15, citing *Univ. of Cincinnati* at 111; see also *Jones v. Franklin Cty. Sheriff* (1990), 52 Ohio St.3d 40, 43, quoting *Graziano v. Amherst Exempted Village Bd. Of Edn.* (1987), 32 Ohio St.3d 289, 293 (stating "due deference must be accorded to the findings and recommendations of the [ALJ] who is best able to observe the demeanor of the witnesses and weigh their credibility").

[¶12] On appeal to this court, the standard of review is more limited. Unlike the common pleas court, a court of appeals does not determine the weight of the evidence. *Rossford Exempted School Dist. Bd of Edn. v. State Bd. Of Edn.*, (1992), 63 Ohio St.3d 705, 707. In reviewing the common pleas court's determination that the agency's order was

supported by reliable, probative and substantial evidence, this court's role is limited to determining whether the common pleas court abused its discretion. *Roy v. Ohio State Med. Bd.* (1992), 80 Ohio App.3d 675, 680. The term "abuse of discretion" connotes more than an error of law of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore,* (1983), 5 Ohio St.3d 217, 219. However, on the question of whether the agency's order was in accordance with law, this court's review is plenary. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 339, 343.

[¶13] In her first assignment of error, appellant contends it was error for the trial court to conclude her termination was lawful because there is no rule, policy or other directive that explicitly prohibits a state employee from engaging in the activities in which she did, *i.e.*, working on her performance evaluation appeal during work hours. Hence, appellant does not dispute that she worked on her appeal while at work but, rather, it is appellant's contention that, because there is no directive disallowing such conduct, she was without notice that such conduct was in any way prohibited.

[¶14] However, there is more involved with appellant's termination than appellant expecting a nominal amount of work time on her appeal as she asserts under the assigned error, and this matter concerns more than a violation of a "non-existent" work rule. Appellant's removal was based not simply on appellant pursuing her appeal during work hours, but on expending excessive amounts of time that resulted in a neglect of her duties. Appellant's removal was also based on her utilizing McNabb's time and intimidating McNabb in a manner deemed to be an abuse of a subordinate. We recognize appellant disagrees with McNabb's version of events; however, such disputes of fact are to be resolved by the ALJ.

[¶15] The primary witnesses to testify at the

hearing were appellant and McNabb. McNabb testified that appellant and McNabb worked on appellant's appeal in some form or another on a daily basis. According to McNabb, she was asked by appellant to discuss the matter, to sort through e-mails, to put files together, to print things, to proofread materials, and to provide her opinion with respect to the appeal.

[¶16] McNabb testified that on one occasion appellant had a meeting to attend with her supervisors at the state office tower. Appellant asked McNabb to drop her off at the downtown meeting and to wait until appellant called to be picked up. After the meeting, appellant described to McNabb that she requested the meeting be timely because she had ridden with McNabb who was also attending a meeting downtown. This, according to McNabb, was completely untrue, as McNabb had no reason to be downtown at that time and was there only because of appellant's request.

[¶17] On another occasion, appellant asked McNabb to go downtown to file appellant's appeal. A few minutes later, however, appellant called McNabb again and said she did not feel comfortable with that because appellant did not want anyone to see McNabb doing that for her. So, instead, appellant asked if McNabb would drive downtown and meet appellant in the parking garage with the appeal.

[¶18] At another time, appellant called McNabb at home on a Sunday and asked if McNabb would help organize documents for appellant's appeal. Additionally, McNabb testified that appellant began making comments to McNabb indicating that McNabb's supervisors were "watching" her. After appellant because aware that McNabb had met with supervisory personnel regarding the use of her time, McNabb testified appellant came to her and said that maybe McNabb returned from her disability leave too soon and that maybe shw should think about going back on disability leave.

[¶19] Appellant testified to the contrary and that the amount of time spent on her appeal was

negligible. Appellant testified she did ride downtown with McNabb, but it was because McNabb indicated she could go downtown and pick something up for her husband. According to appellant, though she did call McNabb at home on a Sunday, it was to offer McNabb a place to go because McNabb previously indicated she and her son would just be driving around that day. Appellant disputed McNabb's testimony that she asked McNabb to work on anything during that phone conversation. Appellant also testified McNabb must have misunderstood many of the comments made by appellant because at no time was she trying to be intimidating.

[¶20] The ALJ simply found appellant's testimony to not be credible, a finding within the ALJ's province as trier of fact. *Long v. Ohio Dept. of Job & Family Servs.*, 10th Dist. No. 08AP-691, 2009-Ohio-643, ¶48. In assessing credibility, the ALJ noted several examples of the inconsistent nature of appellant's testimony. Based on the problems noted by the ALJ, the ALJ was not arbitrary in her credibility determinations. The ALJ examined the record, discussed the testimony of the witnesses, including appellant's inconsistencies, and made a credibility determination, all of which are within the ALJ' province as trier of fact. See *Naurer,* supra. At ¶20. Though appellant reargues her version of the facts to us, as she did to the trial court, such in not a reason to reverse the trial court's judgment. Accordingly, we overrule appellant's first assignment of error.

[¶21] In her second assignment of error, appellant contends the trial court's statements that "[conducting mandatory employee reviews is a function that furthers the interest of the employer" and "[a]n appeal of the outcome of such review by an individual employee furthers the interest of the employee" are in error. To support her argument, appellant proceeds to direct us to a number of potential and tangential employer benefits that may result if an employee successfully overturns a poor performance evaluation on appeal.

[¶22] While an employer may arguable receive some tangential benefit from an employee's appeal of a performance review, there can be no doubt that pursuit of the same is voluntary and primarily furthers the interest of the employee. Moreover, regardless of these challenged statements, the finding of the trial court was that appellant spent an excessive amount of time on her appeal to the detriment of appellee. The evidence also demonstrated that not only did appellant utilize her own time, but also that of McNabb, appellant's subordinate. Thus, even if the challenged statements of the trial court were in error, reversal would not be warranted. Accordingly, we overrule appellant's second assignment of error.

[¶23] In her third assignment of error, appellant contends it was error for the trial court to find appellant spent an excessive amount of state time and resources on her appeal because the evidence actually established appellant and McNabb devoted "negligible' work time on the appeal.

[¶24] The amount of time spent on appellant's appeal came from the testimony of two persons – appellant and McNabb. As previously stated, the testimony established that appellant had McNabb work on appellant's appeal for a number of hours each day over the course of several weeks. Though appellant attempts to direct us to the inconsistencies within McNabb's testimony, we reiterate that it was within the province of the ALJ as trier of fact to assess credibility and determine the weight of the evidence. McNabb was subject to cross-examination during the hearing on all the issues appellant currently raises before us, and appellant presented her version of facts to the ALJ as well. We have already found the ALJ was not arbitrary in her credibility determinations and, as a result, we overrule appellant's third assignment of error.

[¶25] In her fourth assignment of error, appellant contends it was error for the trial court to conclude the ALJ's report and recommendation comported with law, as the facts establish

progressive discipline rather than removal was warranted. Under Ohio Adm. Code 124-1-02(U), progressive discipline is defined as:

> [T]he act of disciplining an employee in graduated increments and progressing through a logical sequence, such as a written reprimand for a first offence, a short suspension for the second offense, and a longer suspension or removal for the third offense. The severity of the offense may negate the use of progressive discipline.

[¶26] Appellant, however, never raised this issue before the trial court. A party generally waives the right to appeal an issue that could have been, but was not, raised in earlier proceedings. *Leslie*, supra (applying this tenet of law to administrative proceedings), citing *MacConnell v. Ohio Dept. of Commerce*, 10th Dist. No. 04AP-433, 2005-Ohio-1960. See also, *King v. Ohio Dept. of Job & Family Servs.*, 9th Dits. No. 22576, 2005-Ohio-4939.

[¶27] Even if we were to address this issue, we cold only conclude it is without merit. Nichols testified at the hearing that the disciplinary grid serves as a recommendation for discipline, but is not mandatory. Secondly, it is clear that certain offenses could warrant severe discipline such as removal, even for a first offense. According to Nichols, there may be mitigating or aggravating circumstances that alter how the grid is followed. Nichols testified that appellant was in a high position of trust as a bureau chief and was responsible for more than 70 employees and three major M.S.C systems. As such, in Nichols' opinion, such a position calls for the "highest ethical and professional standards" and appellant's actions constituted an "egregious offense." (Tr. 159.) Hence, even if we were to consider this assigned error, we would overrule it because the grid providing for progressive discipline is discretionary, not mandatory, and there is evidence of aggravating circumstances in the record. See

Gaither-Thompson v. Ohio Civ. Rights Comm., 176 Ohio App.3d 493, 2008-Ohio-2559 (while R.D. 124.34 describes the procedures governing an agency's termination of an employee in the classified civil service, it does not require the agency to follow the rules of progressive discipline unless the agency agrees otherwise in a collective-bargaining agreement); *Swigert b. Kent State Univ.*, 11th Dist. No. 2004-P-0037, 2005-Ohio-2258; *Carmichael v. State Personnel Bd. Of Review* (June 10, 1993), 10th dist. 92AP-1707.

[¶28] For the foregoing reasons, appellant's fourth assignment of error is overruled.

[¶29] In her firth assignment of error, appellant contends the trial court erred in failing to find appellant was improperly disciplined twice for the same offense.

¶30] According to appellant, a letter dated October 14. 2005 constituted a written reprimand for appellant " 'using state time, state resources and other staff for personal work on a performance evaluation appeal.' " (Appellant's brief at 28.) Therefore, according to appellant, her termination a month later for the same offense is barred by the merger and bar rule of Ohio Adm. Code 124-3-05, which provides:

> (A) All incidents which occurred prior to the incident for which a non-oral disciplinary action is being imposed, of which an appointing authority has knowledge and for which an employee would be disciplined, are merged into the non-oral discipline imposed by the appointing authority. Incidents occurring after the incident for which a non-oral disciplinary action is imposed, but prior to the issuance of the non-oral disciplinary order, are not merged and may form the basis for subsequent discipline.

***

> (2) For purposes of this rule, non-oral discipline includes written reprimands ans suspension orders. It does not include a written memorandum of oral counseling or written warnings.
>
> (B) Except as provided in rules 124-3-01 and 124-9-04 of the Administrative Code, once discipline is imposed for a particular incident, that incident shall not be used as the basis for subsequent discipline.
>
> (C) Upon written notice to the employee, an appointing authority may rescind non-oral discipline. Recission of non-oral discipline under this rule shall not be a bar to issuing another non-oral discipline based upon the same allegations.

[¶32] Appellant contends her November 21, 2005 termination should have been merged into and barred by the written reprimand received on October 4, 2005. Though the letter is not titled a written reprimand, appellant contends it contains all the indicia, and, therefore, should be considered the same. The trial court reviewed the letter and found it does not mention any sanctions and does not convey any suggestion that it is disciplinary in nature, and, thus, the merger and bar rule is inapplicable. We agree.

[¶32] Nichols testifies at the hearing that the letter was not discipline, and the letter itself states:

> It has come to our attention that you have been using state time, state resources and other state staff for personal work on a performance

> evaluation appeal. This letter puts you on notice that utilizing state employees on state time for your personal business is improper and such actions will not be tolerated. Your actions in this matter may result in discipline up to and including removal.
>
> Further, any retaliatory actions against employees under your supervisory authori8ty or inappropriate comments regarding the Deputy Director or any other management personnel will result in disciplinary action, up to and including removal.

(Oct. 4, 2005 letter at 1.)

[¶33] As evidenced, the letter contains reference to possible future discipline, but is not itself disciplinary in nature. Because the letter is not a written reprimand or other disciplinary measure, the merger and bar does not apply, and appellant's fifth assignment of error is overruled.

[¶34] In her sixth assignment of error, appellant contends it was error for the trial court to conclude that she was afforded adequate due process when she was not properly placed on notice of the specific reasons for her termination. As explained in *Emanuel v. Columbus Recreation & Parks Dept.* (1996), 115 Ohio App.3d 592, because classified state civil servants can be removed only for cause, they possess a property interest in continued employment, which right is protected by the Due Process Clause of the Fourteenth Amendment. To comply with such process requirements, "An appointing authority is required to afford an employee certain protections before appointing authority is required to afford an employee certain protections before terminating employment, including oral or written notice of the charges against the employee, an explanation of the

employer's evidence, and an opportunity to be heard before being terminated." Id at 597, citing *Cleveland Bd. Of Edn. V. Loudermill* (19850, 470 U.S. 532, 546-48, 105 S.CT. 1487, 1495-97; *Seltzer v. Cuyahoga Cty. Sept of Human Servs.* (1987), 38 Ohio App.3d 121, 122.

[¶35] As the trial court found, the record undisputable reflects appellant was given a pre-disciplinary hearing notice containing not only notice of the charges, but also a description of the evidence underlying the same. Further, the record undisputably reflects appellant was given an opportunity to be heard, and that appellant was aware of her post-termination administrative rights and procedures. Finally, we point out that appellant was given full opportunity to present evidence and challenge her removal before the SPBR and the common pleas court. *Swigart* ¶49, citing *Loudermill,* 470 U.S. at 547, 105 S.CT. At 1496, fn. 12 (" "the existence of post termination procedures is relevant to the necessary scope of predetermination procedures.' "); *Robert v. Springfield Loc. School Dist. Bd. Of Edn.* (20010, 144 Ohio App.3d 38, 44 ("a minimal opportunity to be heard at a pretermination hearing is sufficient where the employee is entitled to a full evidentiary hearing post-termination"). Based on the foregoing, we are unable to find appellant was not afforded the requisite due process prior to her termination, and we overrule appellant's sixth assignment of error.

[¶36]Because the common pleas court did not abuse its discretion in concluding substantial, reliable, and probative evidence supports the SBPR's decision upholding appellant's discharge from employment, we overrule appellant's six assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Motion to supplement denied;
judgment affirmed.

BRYANT and BROWN, JJ., concur.

**IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO
CIVIL DIVISION**

MARY H. MACON,

Appellant, **CASE NO. 07CVF-10-14520**

-vs-

JUDGE TIMOTHY S. HORTON

OHIO DEPARTMENT OF JOB AND FAMILY SERVICES

Appellee

DECISION AND ENTRY

AFFIRMING THE STATE PERSONNEL BOARD OF REVIEW"S ORDER TO ADOPT THE REPORT AND RECOMMENDATION

Dated this 27th day of October, 2008

This matter is before the Court Appellant's Notice of Appeal, of her removal from her position with Appellee Ohio Department of Job and Family Services. For the reasoning that follows, this Court **AFFIRMS** the decision.

Factual and Procedural History

Appellant was terminated from her position as a Bureau Chief for Appellee. She was as a classified civil servant at the time of her termination. Appellant contends that her removal from employment was unjustified.

Appellant appealed her removal to the State Personnel Board of Review ("Board"). An evidentiary hearing was conducted on September 26 and

November 2, 2006 before an Administrative Law Judge ("ALJ"). After the hearing, the ALJ found that Appellee met its burden of proof and therefore Appellant's termination was warranted. Appellant filed objections to the ALJ's Report and Recommendation and Appellee filed its responses to the objections. On October 11, 2007, the Board adopted the ALJ's Report and Recommendation and affirmed Appellant's removal. On October 25, 2007, Appellant filed a Notice of Appeal to this Court. The appeal is now ripe for consideration.

As a Bureau Chief, Appellant was responsible for the supervision of approximately seventy employees and also oversaw a budget of approximately $30 million dollars. (Tr. Vol.2 at 45-47; ODJFS Ex.1). Appellant was compensated at an annual salary of $86,320.00.

Deputy Director Kim Liston conduct ed an annual evaluation of Appellant's performance, which was given to Appellant on or about July 15, 2005. (Tr. Vol.3 at 134; Macon Ex. 15). Appellant's request was denied. Appellant filed the step 2 review request, which was also denied on or about September 12, 2005. (Tr. Vol.3 at 135). Appellant then commenced her last step review on September 26, 2005 to request that the matter be evaluated by the Department of Administrative Services (DAS").(Tr. Vol.2 at 187). On October 28, 2005, DAS denied the appeal. (ODJFS Ex.7).

Appellant was provided with a R.C. § 124.34 Order removing her from employment effective on November 21, 2005. Appellant thereafter filed an appeal with the Board. An evidentiary hearing was conducted over two days. Prior to the hearing, Appellant filed a motion with the Board to request that the removal be disaffirmed as a matter of law. Appellant raised similar issues at the hearing.

At the hearing, testimony was elicited by Appellee to demonstrate that Appellant abused her authority b instructing her subordinates to work on her appeals. (Tr. Vol.3 at 13-19 & 27-28). Evidence was also presented that Appellant used State time to

work on her appeals and Appellant admitted to having a state employee assist her with the appeals. (Tr. Vol.3 at 187-190 & 201-206)

On September 7, 2007, the ALJ issued a Report and Recommendation. The ALJ determined that Appellant was terminated for using an inordinate amount of State time to prepare the step appeals of her negative job performance. The ALJ found that Appellant ordered a subordinate state employee to help with her step appeal. The ALJ held that Appellee met its burden in regard to that issue. The ALJ also determined that Appellant was lawfully removed based on her abuse of her position.

Appellant filed objections to the Report and Recommendation and Appellee responded. On October 11, 2007, the Board adopted the ALJ's Report and Recommendation and affirmed Appellant's removal.

Standard of Review

Appellant was removed from her position with by Appellee pursuant to R.C. § 124.34. R.C. § 124.34(A) provides:

> The tenure of every officer or employee in the classified service of the state and the counties, civil service townships, cities, city health districts, general health districts, and city school districts of the state, holding a position under this chapter, shall be during good behavior and efficient service. No officer or employee shall be reduced in pay or position, fined, suspended, or removed, or have the officer's or employee's longevity reduced or eliminated, except as provided in section 124.32 of the Revised Code, and for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public,

> neglect of duty, violation of any policy or work rule of the officer's or employee's appointing authority, violation of this chapter or the rules of the director of administrative services or the commission, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony.

Review by this Court of an administrative agency is governed by R.C. § 119.12 and the multitude of cases addressing that section such as *Univ. of Cincinnati v. Conrad* (1980), 63 Ohio St.2d 108. The *Conrad* court held that in an administrative appeal filed pursuant to R.C. § 119.12, a trial court must review the agency's order to determine whether it is supported by reliable, probative and substantial evidence and is in accordance with law. The *Conrad* court set forth at pages 111 and 112 that:

> In undertaking this hybrid form of review, the Court of Common Pleas must give t he due deference to the administrative resolution of evidentiary conflict s. For example, when the evidence before the court consists of conflicting testimony of approximately equal weight, the court should defer to the determination of the administrative body, which, as the fact-finder, had the opportunity to observe the demeanor of the witnesses and weigh their credibility. However, the findings of the agency are by no means conclusive.
>
> Where the court, in its appraisal of the evidence, determines that there exist legally significant reasons for discrediting certain evidence relied upon by the administrative body, and necessary to its determination, the court

and substantial evidence. Therefore, the Board's Decision to adopt the Report and Recommendation and the resulting affirmation of Appellant's removal was appropriate.

In addition, Appellant argues that her termination was inappropriate because she previously received a written reprimand as her sanction for wrongful conduct and therefore the merger and bar rule should apply. Appellant relies on a letter dated October 4, 2005 as evidence of her contention. Ohio Admin. Code 124-3-05 provides:

> (A) All incidents which occurred prior to the incident for which a non-oral disciplinary action is being imposed, of which an appointing authority has knowledge and for which an employee could be disciplined, are merged into the non-oral discipline imposed by the appointing authority. Incidents occurring after the incident for which a non-oral disciplinary action is being imposed, but prior to the issuance of the non-oral disciplinary order, are not merged and may form the basis for subsequent discipline.
>
> (1) For purposes of this rule, knowledge of an appointing authority will include knowledge of those persons with authority to impose non-oral discipline for the appointing authority.
>
> (2) For purposes of this rule, non-oral discipline includes written reprimands and suspension orders. It does not include a written memorandum of oral counseling or written warnings.
>
> (B) Except as provided in rules 124-3-01 and 124-9-04 of the Administrative Code, once discipline is imposed for a particular incident, that incident shall not be used as the basis for subsequent

discipline.

> (C) Upon written notice to the employee, an appointing authority may rescind non-oral discipline. Rescission of non-oral discipline under this rule shall not be a bar to issuing another non-oral discipline based upon the same allegations.

Appellant argues that the removal surrounded the same allegations of wrongdoing as contained within the October 4, 2005 letter. Appellant contends that the October 4, 2005 letter was a formal written reprimand and therefore pursuant to the merger and bar rule, she could not be twice reprimanded for the same conduct.

Appellant argues that the October 4, 2005 letter, though not titled as a written reprimand should have been viewed as such. Appellant concedes that there exists no formal definition for a written reprimand but instead submits that the October 4, 2005 letter contained all of the necessary elements.

Appellee responds that the rule is inapplicable as the letter was not a written reprimand nor disciplinary in nature. Appellee argues that the letter is not on standard Labor Relations form and fails mention any reprimand. Appellee submits that the letter was in the form of corrective counseling, which specifically is not considered discipline. (ODJFS Ex.4 at VI, Procedures, D. Corrective Counseling at p.6). Appellee relies on the testimony of Assistant Deputy Director Nichols who testified that the letter was not discipline. (Tr.Vol2 at 197).

A complete review of the October 4, 2005 letter confirms Appellee's arguments. The letter does not mention reprimand or any sanction. The letter merely contains an inference of possible future discipline. Please note the following from the body of the letter:

> This letter puts you on notice that utilizing state employees on state time

> for your personal business is improper and such actions will not be tolerated. Your actions in this matter may result in discipline up to and including removal. (Emphasis added.)(ODJFS Ex.4.)

This Court finds that the above-noted language does not convey any suggestion that the letter was discipline. Therefore, this Court finds that Appellant's arguments concerning the merger and bar rule are unpersuasive.

Appellant argues that she denied due process because the formal termination notice did not give her adequate notice of the charges for which she was being terminated. Appellant relies on R.C. § 14.34(B) and *Seltzer v. Cuyahoga Cty. Dept. of Human Serv.* (1987), 38 Ohio App.3d 121, to support her argument. The syllabus of *Seltzer* reads as follows:

> 1. A classified civil servant has a property right in continued employment, which right is protected by the Due Process Clause of the Fourteenth Amendment.
> 2. A classified civil servant who is about to be discharged is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to be heard before he is discharged, coupled with post-termination administrative procedures as provided by R.C. 124.34.
> 3. A public employer which intends to discharge a classified civil servant must provide the subject employee with legally sufficient notice of an impending loss of his property interest so as to afford the employee an opportunity to respond prior to termination.

Appellant's due process claim requires that this Court review the procedures used by Appellee that led to Appellant's termination. The evidence demonstrates that Appellant does not deny the

receipt of the termination notice. It is also undisputed that Appellant had an opportunity to be heard before she was discharged and she has clearly been aware of her post-termination administrative rights and procedures. Appellant's sole clai8m is that the Order of Removal she received on Nobe3mber 21, 2005 was somehow deficient when it only listed: "Violation of the Employer's Disciplinary Policy: F26 - Violation of ORC 124.34, to wit: Neglect of Duty, Dishonesty, Failure of Good Behavior, insubordination."

In response. Appellee argues that Appellant failed to exhaust her administrative remedies. Appellee argues that if Appellant was confused, she could have utilized Ohio Admin. Code 124-13-03 to request a more definite statement. Appellee further argues that Appellant received due process, specifically referring to the November 7, 2005 notice of a pre-disciplinary meeting. Having reviewed the procedures followed by Appellee and the applicable case law, this Court determines that Appellant was afforded due process of law. Appellant's arguments to the contrary are without merit.

After an independent review of the record and the law, this Court finds that the Order of the State Personnel Board of Review to Affirm the Report and Recommendation of the ALJ was appropriate. The ALJ's Report and Recommendation was not unlawful or unreasonable, nor was it against the manifest weight of the evidence and it was in accordance with the law. Accordingly, the Court hereby **AFFIRMS** the Decision of the Board. This is a final appealable order.

IT IS SO ORDERED.

Timothy Horton, Judge